RECOVERY OF SALARY BY A DE FACTO OFFICER.

I.

THE *de facto* doctrine in the law of officers has been a continual source of difficulty to the courts for more than a century. Many questions connected with the application of this doctrine to this branch of the law have been settled beyond controversy. Even the phase of this question which the writer proposes to discuss cannot be classed as new or novel. Recent years, however, have seen the development of certain tendencies on the part of some of the American courts in the application of this doctrine, which will furnish the subject for the major part of our consideration.

A "*de facto* officer" has been defined by Lord ELLENBOROUGH[1] to be "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." This definition has been enlarged upon by Chief Justice BUTLER in the leading case of *State* v. *Carroll*,[2] as follows, "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid *so far as they involve the interests of the public and third persons,* (italics ours) where the duties of the office were exercised,

"First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

"Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." This statement is generally recognized as the best and most comprehensive definition ever given of the term "*de facto* officer."

Having before us this definition let us proceed at once to examine

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[1] Rex v. Bedford Level (1805), 6 East 356.

[2] (1871), 38 Conn. 449, 471.

the right, if any, which a *de facto* officer has to the salary of the office whose duties he has performed. The cases in the courts of this country which have considered this question may be divided into three classes or groups, which are (1) those cases holding that in an action for the salary or emoluments of an office the plaintiff must show a good title to the office and therefore the *de facto* officer cannot recover in such an action; (2) those cases holding that the right to the salary and emoluments of an office arises not out of the title thereto but out of the actual performance of the duties of the office and therefore the *de facto* officer can recover in an action for the salary of an office, which he has claimed and held without force or fraud although there was, in fact, another rightful claimant to the office; (3) those cases which hold that as between the *de jure,* and the *de facto,* officer the former is entitled to the salary and emoluments of the office even though the latter may have performed the duties thereof, but when there is no other claimant, the *de facto* officer holding in good faith under color of title may recover from the State or municipality the salary or fees of the office.

The cases falling within the first class above named greatly outnumber the cases in both of the other classes.[3] The only cases which fall within the second class are those decided by the New Jersey courts. The law on this question in New Jersey is declared by three cases. The first case dealing with this question is that of *Stuhr* v. *Curran,*[4] in which it was held, by a court divided seven to five, that a *de jure* officer could not recover from the *de facto* officer the installments of salary received by the latter while in possession, and performing the duties, of the office, which he claimed and held in good faith and without fraud. Two years later the New Jersey Court of Errors and Appeals decided the case of *Meehan* v. *Freeholders of Hudson County,*[5] holding therein that a *de facto* officer could not recover in an action for salary where he gained possession of the office by force or fraud. Several years later in 1897, to be exact, the same court decided the case of *Erwin* v. *Mayor, etc., of Jersey City,*[6] by which the doctrine as it now exists in New Jersey was fully established. In the case last mentioned the court held

[3] Philadelphia v. Given (1869), 60 Pa. St. 136; Matthews v. Supervisors (1876), 53 Miss. 715; Coughlin v. McElroy (1902), 74 Conn. 397, 50 Atl. 1025; (This was not an action for salary, but the opinion contains statements concerning the point in question.) Christian v. Gibbs (1876), 53 Miss. 314; People ex rel. Morton v. Tieman (1859), 30 Barb. 193; People ex rel. Culbertson v. Potter (1883), 63 Cal. 127; See cases cited under note No. 16, which are all in point on the proposition stated above.

[4] (1882), 44 N. J. L. 181.

[5] (1884), 46 N. J. L. 276.

[6] (1897), 60 N. J. L. 141.

"that one who becomes a public officer *de facto* without dishonesty or fraud, and who has performed the duties of the office, may recover such compensation for those services, as is fixed by law, from the municipality which is by law to pay such compensation." It is worthy of note in connection with the foregoing case, even though the court made no mention of the fact, that there was no *de jure* claimant of the office during the time of the plaintiff's service.

In the courts of five states—Utah, South Carolina, Arizona, New Hampshire, and Oklahoma—there have been decided cases which properly fall within the third class.[7] Justice McCARTY, in *Peterson* v. *Benson*,[8] speaks of the courts in this class of cases as following an "intermediate course, namely, that as between an officer *de facto* and a *de jure* officer the latter is entitled to whatever salary and other compensation may be attached to the office, even though the *de facto* officer may have performed all the duties of the office. This doctrine is based upon the theory that unless the *de jure* officer is protected, dishonest intruders will lay claim to the office, and, obtaining possession thereof, will claim the emoluments to the detriment of the public and the injury of the *de jure* officer. In cases, however, where there is no *de jure* officer, the line of decisions last mentioned hold that a *de facto* officer who, in good faith, has had possession of the office and has discharged the duties pertaining thereto, *is legally entitled to the emoluments of the office* (italics ours), and may, in an appropriate action, recover the salary, fees and other compensation attached to the office." The court in this case believed the rule stated to be "more in consonance with the principles of equity than the opposite rule," and allowed the *de facto* officer to recover the salary of the office. This case furnishes the best statement, known to the writer, of the doctrine of the cases belonging to the third class.

The case of *Dickerson* v. *City of Butler*[9] is often cited as supporting this doctrine of the third class of cases. This case cannot be properly so used since the decision therein is based on the principle that in an action of mandamus for the purpose of compelling the auditing and payment of a salary claim by the disbursing officers of the State or municipality the title to the office cannot be decided and therefore one having *prima facie* title to the office, *i. e.*, the person in possession of the office and executing its duties and holding the

[7] Peterson v. Benson (Utah, 1910), 112 Pac. 801; Elledge v. Wharton (So. Car. 1911), 71 S. E. 657; Behan v. Davis (1892), 3 Ariz. 399, 31 Pac. 521; Adams v. Directors (1895), 4 Ariz. 327, 40 Pac. 185; Cousins v. Manchester (1892), 67 N. H. 229; Blackburn v. Oklahoma City (1893), 1 Okla. 292.

[8] Supra, Note No. 7.

[9] (1887), 27 Mo. App. 9. See also Reynolds v. McWilliams (1873), 49 Ala. 552 and Henderson v. Glynn (1892), 2 Col. App. 363.

same under color of right, at the time of bringing the action, may recover the salary of the office.[10] Without approving or disapproving this doctrine, which, perhaps, receives some support from the courts of some other States,[11] it is certainly safe to say that neither the Missouri case cited, nor any other decided by the courts of that State, upholds the principle enunciated in the cases of the third class above mentioned. In Missouri, in all cases where the *de facto* officer with *prima facie* title seeks to compel the payment to him of the salary of the office by a mandamus directed to the proper disbursing officers, he is allowed to recover irrespective of whether there is another claimant of the office, who later may be determined to be the *de jure* officer. The courts of that State, however, intimate that if such recovery is allowed and later another than the person *de facto* in office is determined to be the *de jure* officer, he may recover, in a suit against the *de facto* officer, that portion of the salary of the office which the latter has received.[12] As in the third class of cases mentioned, however, there are no other claimants than the *de facto* incumbent of the office, the practical result under such circumstances would be the same in Missouri as in those States which adhere to the principles of the said third class, provided the *de facto* officer resorts to mandamus for his relief. For in Missouri, in such a proceeding, the *de facto* officer with *prima facie* title would recover the unpaid salary, and, there being no one who could later be determined to be the *de jure* officer and allowed to recover the salary paid to the *de facto* officer in an action against the latter for that purpose, the *de facto* officer would retain the installments paid unmolested, unless the State or municipality were allowed to recover from him the sum so received, which would happen infrequently even were it allowed by the courts.[13] In any action, other

[10] See also State ex rel. v. John (1883), 81 Mo. 13; State ex rel. v. Draper (1871), 48 Mo. 213; State ex rel. v. Clark (1873), 52 Mo. 508; Hunter v. Chandler (1870), 45 Mo. 452.

[11] Ex parte Lusk (1886), 82 Ala. 519; Mannix v. State (1888), 115 Ind. 245; Meredith v. Supervisors (1875), 50 Cal. 433; State v. Sherwood (1873), 15 Minn. 221; Duane v. McDonald (1874), 41 Conn. 517; (These cases are all on the general proposition that mandamus is not the proper proceeding to try title to office, except the California case which seems more directly in point in support of the Missouri doctrine.) The doctrine of the Missouri cases is directly opposed by the case of State ex rel. Hamilton v. Grant (1905), 14 Wyo. 41, 81 Pac. 795, and the case of City of Chicago v. People (1904), 111 Ill. App. 594, and of course by those cases which allow mandamus generally to be used to try the title to office. See Lindsay v. Luckett (1857), 20 Tex. 516; Harwood v. Marshall (1856), 9 Md. 83; Putnam v. Langley (1882), 133 Mass. 204.

[12] Mullery v. McCann (1888), 95 Mo. 579; State ex rel. Vail v. Clark (1873), 52 Mo. 508.

[13] See Kerr v. Regester (1908), 42 Ind. App. 375, 83 N. E. 790, and Moffet v. People (1907), 134 Ill. App. 550. But see also Territory v. Newhall (1909), 15 N. Mex. 141, 103 Pac. 982.

than mandamus, by the *de facto* officer against the State or municipality to recover his salary, the courts of this State would not allow him to recover, for they hold that the officer's right to salary is dependent upon the legal title to the office rather than on the performance of the duties thereof,[14] and this is true even though, under the facts, there is no other claimant to the office.[15]

As expressly opposed to the cases which fall in class three, there are decisions in at least five jurisdictions[16]—Illinois, Kansas, Mississippi, Arkansas and Kentucky. And as opposed to such cases by inference from the facts, in other words refusing to allow the *de facto* officer to recover the salary of the office where the facts themselves show there was no other claimant though the opinion does not comment on this feature, are cases in at least nine other jurisdictions[17]—Missouri, California, United States (Court of Claims), Pennsylvania, Massachusetts, Minnesota, Nevada, Ohio, and North Carolina.

What are the reasons which can be offered in support of the rule which allows a recovery of salary by the *de facto* officer where there is no *de jure* claimant of the office? One naturally looks to two sources for such reasons, and expects either to find them in the *de facto* doctrine itself or to deduce them from the nature of the right which any officer has to the salary of his office. In the foregoing pages[18] Chief Justice BUTLER'S definition of a *de facto* officer has been quoted. In the extract from his opinion we have emphasized, by italicizing, a certain clause. This calls attention to the fact that the *de facto* doctrine, as Justice BUTLER understood it, and, indeed, as it has been generally understood and applied in the law of officers,[19] is only a means to protect the interests of the public and third parties in their dealings with persons exercising the duties of public

[14] State ex rel. v. Walbridge (1899), 153 Mo. 194, 203; Gracey v. St. Louis (1908), 213 Mo. 384, 111 S. W. 1159.

[15] Sheridan v. St. Louis (1904), 183 Mo. 25.

[16] Scott v. Chicago (1903), 205 Ill. 281; Garfield Twp. v. Crocker (1901), 63 Kan. 272; City of Vicksburg v. Groome (1898), Miss. unreported, 24 So. 306; Cobb v. Hammock (1907), 82 Ark. 584, 102 S. W. 382; Stephens v. Campbell (1900), 67 Ark. 484; Eubank v. Montgomery County (1907), 127 Ky. 261, 32 Ky. Law 91, 105 S. W. 418.

[17] Sheridan v. St. Louis (1904), 183 Mo. 25; Burke v. Edgar (1885), 67 Cal. 182; Romero v. United States (1889), 24 Ct. of Claims 331; Commonwealth ex rel. Bowman v. Slifer (1855), 25 Pa. St. 23; Dolliver v. Parks (1884), 136 Mass. 499; Egan v. Scram (1901), 82 Minn. 420; Meagher v. County of Storey (1869), 5 Nev. 244; Phelan v. Granville (1886), 140 Mass. 386; State v. Newark (1898), 8 Ohio Dec. 344; Darby v. Wilmington (1877), 76 N. Car. 133; Northup v. United States (1909), 45 Ct. of Claims 50.

[18] See page 178 of this article.

[19] McCue v. Circuit Court of Wapello County (1879), 51 Iowa 60; Jewell v. Gilbert (1885), 64 N. H. 13, 5 Atl. 80; State ex rel. Cosgrove v. Perkins (1897), 139 Mo. 106, 117, 140 S. W. 650; People v. White (1840), 24 Wend. 520, 539.

offices under color of right but without good claim to be the *de jure* officers. In the words of Chief Justice BUTLER, "The *de facto* doctrine was introduced into the law as a matter of policy and necessity to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers."[20] A moment's reflection will convince one of the imperative necessity for the adoption of such a doctrine. Public business would soon be at a standstill but for this doctrine. Will anyone contend that the public at large would be ready to deal with the one occupying the office though not decided to be the *de jure* officer, if the individuals dealing with such a person were obliged to ascertain at their peril whether he was the *de jure* officer? Surely, if this were the rule, it is not difficult to imagine circumstances under which the business connected with a public office would be entirely suspended until a decision was had in a court of last resort on the title to the office. Under such a rule no one could feel safe in dealing with the incumbent of a public office until such a decision was had. It does not seem absurd, or even exaggerated, to say that without the *de facto* doctrine the public business would be demoralized and the orderly conduct of a public office would be absolutely impossible. As Justice COOLEY said in his dissenting opinion in an early Michigan case involving the *de facto* doctrine,[21] "The public who have an interest in the continuous discharge of official duty, and whose necessities cannot wait the slow process of a litigation to try the title, have a right to treat as valid the official acts of the incumbent, with whom alone, under the circumstances, they can transact business. This rule is an obvious and necessary one for the protection of organized society; for as was said in *Weeks* v. *Ellis,* 2 Barb. 325, the affairs of society cannot be carried on unless confidence were [is] reposed in the official acts of persons *de facto* in office." Again in the opinion in the case of *Mallett* v. *Uncle Sam Mining Company,*[22] it is said, "The rule (*i. e.*, of *de facto* officer) is dictated by the most obvious necessity. If the acts of public officers could at any time be overthrown by the showing of some irregularity or informality in their election or appointment, all confidence in the judgment of the courts would be destroyed, and all judicial proceedings would ever be involved in doubt and uncertainty."

It is this reason of public policy and public necessity which has in-

[20] State v. Carroll, 38 Conn. 449, 467.
[21] Auditors of Wayne County v. Detroit (1870), 20 Mich. 176, 187.
[22] (1865), 1 Nev. 188.

troduced the *de facto* doctrine into the law of officers. To justify any extension of the application of the doctrine the original reason for its use must be present. If, then, we are to justify the rule which allows "one who has the reputation of being the officer, without in fact being" it, to recover the salary of the office where there is no other claimant, by a resort to the *de facto* doctrine, we should find in the situation at hand the reason of public policy and necessity demanding the application of the *de facto* doctrine. Is there any such reason present in the situation suggested? Does public policy require that one who has performed the duties of an office, but whose appointment or election is defective, or who has not qualified, shall be paid the salary of the office where there is no *de jure* claimant? The adoption of the rule allowing such an incumbent to recover the salary of the office would tend to encourage carelessness in the appointment or election of the officer and in his acts complying with the conditions precedent to becoming a *de jure* officer as its practical effect is to abolish all distinction between the person *de facto* in office and the *de jure* officer. This, certainly, is a result which is not for the public good. To allow this rule to prevail in its logical fullness would result in the encouragement, in some instances, of the non-observance of statutes. For example, in those States where the filing of a bond is made a condition precedent to becoming a *de jure* officer, the adoption of the rule suggested above, and the consequent abolition of the last distinction between a *de jure* officer and a person *de facto* in office, would remove the most effective spur to urge compliance with such a statute. The courts which have adopted this rule allowing recovery by the *de facto* officer have found it necessary to limit it in its application to those cases where the claimant has become a *de facto* officer without dishonesty or fraud.[23] The illustration above offered suggests the necessity of another limitation barring from recovery those persons who, though they have acted in good faith, are not *de jure* officers because they have failed to do some act or acts which the law imposes upon them. These very limitations indicate the illogicalness of the rule itself. If dishonesty and fraud would be encouraged by allowing men *de facto* in office to recover the salary of the office, so likewise would carelessness be encouraged by allowing men *de facto* in office through carelessness to recover the salary thereof. And even granting that the original carelessness has occurred in the appointment or the election, and is not directly that of the claimant of the office, will not he be less likely to scrutinize carefully the method and powers of appointment or

[23] Elledge v. Wharton, supra; Peterson v. Benson, supra.

election if he will have the same rights as a *de facto* officer as he would have as an officer *de jure*? And will not the abolition of this distinction have the same injurious effect upon the performance of their duties by the officers who appoint to office or conduct elections of officers?

It is true that the public must have servants and any rule which will seriously interfere with supplying this need is certainly opposed to public policy. Likewise any rule which has a tendency to cause men to regard lightly any statutory provision for the regulation of the appointment, election or qualification of public officers is injurious to the public weal. The argument, advanced by some lawyers, that a denial of the rule allowing recovery of salary by one *de facto* in office will tend seriously to cripple the public service, since it puts upon each claimant the duty, at his peril as regards his salary, of determining the validity of his appointment or election or the sufficiency of his compliance with the conditions precedent to the assumption of office, which will in many cases deter the claimant from accepting the office and thus result in leaving it vacant, is not likely to commend itself to the majority of thinking men. So long as we have so many men of bad character who risk prison sentences by adopting improper methods to gain office and so many men of good character who, with their bondsmen, are willing to take such great financial risks as are imposed upon the incumbents of offices having to do with the collection or administration of the State and national revenues in those jurisdictions in which the officer and his bondsmen are held liable to make good any money stolen or lost without the fault of the officer,[24] no one will easily be persuaded that it is necessary to take steps to encourage men to accept office.

Undoubtedly some, if not all, of the courts which have declared themselves in favor of allowing the man *de facto* in office, when there is no other claimant, to recover the salary of the office, have reached this conclusion partly because they attached some peculiar significance to the term "*de facto* officer." It is, perhaps, not strange that this should be the case and that the "*de facto* officer" so called should be regarded as an officer, though a little different from the *de jure* officer. The history of the *de facto* doctrine, however, shows the fallacy of this conception. No one but the person *de jure* in office can be properly called an officer. The person *de facto* in office is really no officer at all, but is simply a person who, without right, is performing the duties of the office and whose acts the law, be-

[24] United States v. Prescott (1845), 3 How. 587; Muzzy v. Shattuck (1845), 1 Denio 233; Commonwealth v. Comly (1846), 3 Pa. St. 372; State v. Harper (1856), 6 Ohio St. 607.

cause public policy requires it, regards as valid and binding when they affect the public and third persons in good faith dealing with him as an officer. The incumbent of an office is treated as an officer *de facto,* as was said by Chief Justice BUTLER,[25] "not because of any quality or character conferred upon the officer, or attached to him by reason of any defective election or appointment, but a name or character given to his acts by the law for the purpose of validating them." So we conclude there is no basis in the *de facto* doctrine itself for allowing the incumbent of an office without legal right to recover the salary of the office, even in the absence of another claimant. And it is believed that courts which have found support for this rule in the *de facto* doctrine have misunderstood the term "*de facto* officer" and regarded it as a "quality or character" of the man rather than a "quality or character" given to his acts.

[To be continued]

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[25] State v. Carroll, 38 Conn. 449, 467.